Charo alias Pastor Haron Kalume v Republic (Criminal Appeal E066 of 2023) [2026] KEHC 3172 (KLR) (4 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E066 OF 2023

JN NJAGI, J

MARCH 4, 2026

BETWEEN

SAMMY M CHARO ALIAS PASTOR HARON KALUME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. R. M. Amwayi, Senior Resident Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E013 of of 2020 delivered on 15/8/2022)

JUDGMENT

1. The appellant was convicted in counts 1 and 4 for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. He was also convicted in Counts 2 and 3 for defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence in count 1 were that on diverse dates between October 2019 and September 2020 at (name withheld) village in Kaloleni sub county in Kilifi county within Coast Region he intentionally and unlawfully committed acts which caused his male organs namely penis to penetrate the female genital organ namely vagina of M. M. (the victim in count 1) a child aged 17 years. The particulars of the charge in court 2 were that at the same dates and place as in count 1 he intentionally and unlawfully caused his penis to penetrate the vagina of H. K (the victim in count 2) a child aged 15 years. The particulars of the charge in count 3 were that on the same dates and place as in count 1 he caused his penis to penetrate the vagina of Z. N (Herein referred to as the victim in count 3) a child aged 15 years. The particulars of the charge in count 4 were that on the same date, and place as in count 1 he unlawfully caused his penis to penetrate the vagina of E. Z (herein referred to as the victim in count 4) a child aged 17 years.

3. The Appellant was sentenced as follows:

   Count 1: To serve 10 years imprisonment

   Count 2: To serve 15 years imprisonment.

   Count 3: To serve 15 years imprisonment

   Count 4: To serve 10 years imprisonment.

   Sentence was ordered to run consecutively.

4. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that;

   1. The learned trial magistrate erred in law and fact by allowing the victims PW1, PW2, PW3 and PW4 to give sworn evidence without conducting a voire dire examination to determine whether they were possessed with sufficient intelligent to understand the importance of telling the truth.

   2. The learned trial magistrate erred in law and fact by basing the Appellant's conviction on scanty and inclusive medical evidence.

   3. The learned trial magistrate erred in law and fact by convicting the Appellant yet the charge was not proved.

   4. Whether the learned trial magistrate had legitimate power of desertion when sentencing the Appellant.

Case and Prosecution

5. The case for the prosecution is that the 4 complainants were school going children and hailed from the same village. That in the year 2019, the appellant went to their village and was accommodated by a co-villager called Michael Nyanje. That the Appellant posed as a pastor and started to pray for people. Villagers started to troupe to his house at Nyanje's home for evening prayers. The complainants were among the faithful who went to him seeking for healing prayers. The prayers extended to evening hours.

6. It was the evidence of the victims that the evening prayers were being conducted in the sitting room of the Appellant`s house. That after several sessions of prayers the appellant convinced them to spend the nights at his house. They started to spend the nights there. That in the course of spending the nights in the house the Appellant started to call each girl separately to an adjacent bedroom for special prayers. He would then defile the girl in the bedroom. He would ask them not to disclose it to anybody. Among the girls defiled were the 4 victims in this appeal. It is not until one of the girls called Saumu got pregnant from the Appellant`s tirades that policemen found them in the house and arrested them.

7. It was the evidence of HKK, the victim in count 2, (PW1 in the case) that she was at the time aged 15 years. That the Appellant called her to the bedroom three times where he defiled her. That on the first day he asked her to have sex with him so that the grace of God could be upon her. That when he called her to the bedroom to have sex with him for the fourth time she declined.

8. Z.N. K, the victim in count 3 (PW2 in the case) told the trial court that she was at the time aged 14 years. That the Appellant called her to the bedroom for the first time in 2019. That he told her that God had sent him to have sex with her and she would have God`s grace upon having sex with him. That she allowed him to have sex with him since he was a pastor and had been praying for her. That he would call her to his bedroom to have sex with her after 2 – 3 weeks. That he had sex with her a total of

10 times. He would warn her not to disclose their secret to anybody. That whenever they would have sex he would play music at loud volume so that those in the sitting room would not hear.

9. On her part, the victim in count 4, E.Z. (PW3 in the case) testified that she was at the time aged 16 years. That the Appellant called her to the bedroom for the first time towards the end of 2019. That he told her that if she had sex with him she would get to see the light in God`s Kingdom and that it would chase away the evil spirits that were following her. She agreed and had sex with him since he was a man of God. He warned her not to tell anyone. That he would call her to his room every 3 weeks to have sex with her. That he had sex with her more than 10 times. That he would shut the door tight so that the others would not hear what was going on.

10. M.M.K, the victim in count 1 who was PW4 in the case told the trial court that she was at the time aged 17 years. That she started to going to the Appellant`s church in 2019 to be prayed for as she was unwell. That she started a sexual relationship with him in October 2019. She had sex with him from that month. That is September 2020 she was arrested at night with other girl`s in Alex Kahindi`s compound where the church was. They were taken to Kaloleni police station and then to Mariakani sub county hospital where she was examined and found to be pregnant.

11. The mother to MMK (PW4) who was PW5 in the case testified that her daughter PW4 was attending the Appellant`s church. That she later told her that the appellant had instructed them to be sleeping at the church. She tried to dissuade her but she did not listen. Later she and other girls were arrested by the police at the church. She was taken to hospital where she was examined and found to be pregnant.

12. The mother to HKK (the victim in count in count 2), PW7 testified that her daughter was attending the Appellant`s church. That later the girl told her that the appellant had told them to be sleeping at his house. She started to sleep overnight there with other girls in the name of attending night prayers. That parents of the children complained about their girls sleeping there and they reported to the police. Police went to Nyanje`s house where they arrested her daughter and other girls and the Appellant.

13. The victims upon being taken to Mariakani sub county hospital were examined by a clinical officer PW 8. He found each of them with a missing hymen. He sent them for lab tests. The victim in count 1, PW4 (MMK) was found to be pregnant. He completed their P3 forms.

14. The case was investigated by PC Elvis Otieno PW10 of Kaloleni police station. It was his evidence that on 9/10/2020, a girl called Saumu Kahindi reported at the police station that she had been defiled by a certain person. She took them to the house of the suspect. That on knocking the door and entering the house they found children and some adult females sleeping on a mat in the sitting room of the house. There was a bedroom where they found the Appellant sleeping with an adult lady. They interrogated the children who revealed that the appellant had been defiling them. They rescued 10 children and took them to the police station. The four victims in this case were among them. The children were taken to Mariakani sub county hospital where they were examined and 6 of them were found to have ben defiled. They were issued with P3 forms. The Appellant was charged with the offences. During the hearing he, the investigating officer, produced the victims` birth certificates as exhibits, P.Exh. 1, 5, 9 and 13.

15. It was further evidence of PC Otieno that PW4 gave birth and a DNA test was done on the baby and the Appellant was found to be the biological father of the baby.

16. A government analyst based at Mombasa Government Chemist laboratory PW9 testified that he analyzed buccal samples taken from the Appellant, a baby called B and the mother of the baby MMK (victim in count 1) and did a DNA analysis on them. He found that the Appellant was the biological father of the baby B. 17. He prepared a report to that end. During the hearing of the case in court

he produced the DNA report as exhibit, P.Exh.18. The clinical officer produced the P3 forms, the treatment notes and lab request forms for the victims as exhibits.

Defence case

18. The Appellant in his defence stated that he went to court in November 2012 over case No.E011 (Saumu's case) and after the case was called he was arrested and remanded. He was charged and denied the charges. He said that the complainants were not known to him and he had never seen them. That he came to meet them in court. That he later learnt that the family of the complainants had a feud with his wife`s family over land and they implicated him. That one day he woke up and found his motor cycle damaged but did not know who had damaged it. His posho mill was damaged and he learnt that it the family members of the complainants who had damaged it.

Submissions

19. The Appellant submitted that the trial court did not conduct the voir dire examination on the children as required by the law. In this respect he relied on the case of Johnson Muiruri v Republic (1983) KLR 445 which set out the manner of conducting voir dire examination. It was submitted that failure to conduct proper voir dire examination violated the appellant`s right to fair trial.

20. The appellant submitted that the medical evidence adduced before the court did not support the charges as mere fact of broken hymen is not proof of defilement.

21. It was submitted that the evidence of the complainants showed that they voluntarily consented to the sex. That there was no evidence that the perpetrator used violence so as to have sex with them. That though they were below the age of 18 years they had reached the age of discretion.

22. The appellant submitted that this court has discretion to impose sentences other than those imposed by section 8 of the *Sexual offences Act*.

23. The respondent on the other hand submitted that the charges against the appellant were proved beyond reasonable doubt. That the age of the victims was proved by the birth certificates produced in court. That penetration was proved by the evidence of the 4 victims, PW1, PW2, PW3 and PW4. Additionally, that the evidence of the government analyst proved that the appellant was the father to the child sired by PW4.

24. It was submitted that the appellant was a person well known to the victims as they stayed with him under one roof for several months. That the appellant did not challenge the evidence on identification during cross-examination.

25. It was submitted that the defence tendered by the appellant that he did not know the victims cannot stand as he did not explain how he impregnated PW4 if he did not know her. That he did not call evidence to support his allegation that the complainants` families had a feud with his wife` family. That in face the foregoing the trial court was correct in dismissing the defence as a mere denial.

26. On sentence, it was submitted that the appellant took advantage of his position in society as a pastor and preyed on the very faithful he was supposed to pastor. That the sentence meted on him was proper.

Analysis and determination

27. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding of the Court of Appeal in the case of Kiilu & another v Republic [2005]1 KLR 174 that:

> An appellant on a first appeal is entitled to expect the evidence 'as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

28. I have considered the grounds of appeal, the record of the trial court and the submissions of Appellant and those of the Respondent. The appellant`s grounds appeal revolve on whether the trial court conducted a proper voire dire examination; whether the case was proved beyond reasonable doubt and whether the trial court had discretion to met a lesser sentence than it imposed.

29. The elements of the offence of defilement that the prosecution is required to proof beyond reasonable doubt are: proof of the age of the victim, proof of penetration and proof of the identity of the of the perpetrator, see the Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.

30. In the instant case the appellant was charged with 4 counts of defilement. in Count 1, the prosecution produced evidence by way of birth certificate to prove that the complainant was born on 13/8/2002 thereby making her 17 years at the time of commission of the offence. In Count 2, the birth Certificate produced showed that the complainant was born 29/9/2005 thereby making her 15 years at the time. In Count 3, the prosecution led evidence to show that the complainant was born 14/8/2005 thereby proving that she was 14 years at the time of the alleged offence. Lastly in Count 4, the prosecution produced a birth certificate showing that the complainant was born on 13/8/2003 thereby proving that she was 16 years old at the time of the commission of the offence between October 2019 and September 2020.

31. A voir dire examination is only required to be conducted on a child of tender years. In that case the court has to define who a child of tender years is.

32. A child of tender age was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child under the age of fourteen years. Three of the victims were above the age of 14 years when the offences were committed and when thy testified in court. Only the victim in count 3, Z.N.K, was of the age of tender years ,14 years, when the offence against her was committed. However, she testified in court on 15/2/2021 when she was aged 15 years. All the victims were thereby not children of tender years when they testified in court. Consequently, it was not necessary to conduct voir dire examination on them, though the trial court did so. All of them gave evidence on oath. I thereby do not find substance on the argument on voir examination.

33. The Appellant argued that penetration was not proved as the charges of defilement were not supported by medical evidence. The trial court held that penetration was proved by the evidence of the victim witnesses as supported by medical evidence of the clinical officer.

34. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Penetration can be proved either through the evidence of the child or by circumstantial evidence. The same can be corroborated by medical evidence. In sexual offences involving children it can also be proved by the sole evidence of a child as provided by section 124 of the *Evidence Act* Cap 80.

35. The victims in this case were found with broken hymens. That without more is not necessarily proof of defilement. It has been noted that hymen can be broken by such other activities such as vigorous exercise. Going by this there was no medical evidence to support defilement in the cases of PW1, PW2 and PW3. However, for PW4 medical evidence in the form of DNA showed that the Appellant is the one who fathered the baby born to PW4. This supported the evidence of PW4 that the Appellant defiled her from October 2019 until when she got pregnant in 2020.

36. In sexual offences involving children the court can convict on the sole evidence of a child victim if the court is satisfied that the child is telling the truth. This is provided in section 124 of the *Evidence Act* Cap 80. Th trial court in this matter found the victims to have been consistent and their evidence was cogent. I have no reason to differ with the finding of the trial court. It is clear that the witnesses were truthful that the Appellant defiled them on the dates stated in the charge sheet. Penetration on all the victims was proved against the Appellant.

37. The trial court in convicting the Appellant of the offence held that the victims identified the appellant as the perpetrator of the offence. That the 4 of them knew the appellant very well and were arrested by the police in his house which confirmed that he knew them.

38. I have keenly analysed the testimonies of the PW1, PW2, PW3 and PW4 and I note that all of them gave detailed accounts of how they were lured into sexual intercourse with the appellant. The acts as narrated were repeated over a prolonged period. They narrated how the appellant defiled them in a bedroom during some purported private prayers and the appellant warned them not to disclose the acts to anyone.

39. There is no doubt that the victims knew the Appellant very well as he was their pastor. They stayed with him for a long time and they could not mistake him for someone else. Besides that the mother to PW1 and the mother to PW4 testified in the case and led evidence that the Appellant had started a church in their village and their daughters started to attend his church. That they later started to sleep in the Appellant`s house in the guise of attending prayers. I find the Appellant to have been properly identified.

40. In view of the above finding, there was no truth in the Appellant`s defence that he did not know the victims or that the case was fabricated by the families of the victims due to a land dispute with his wife`s family. These allegations were not raised with the prosecution witnesses during cross-examination. In any case the victims were not from the same family so as to have a land dispute with the family of the wife to the appellant. The appellant did not call any witness to testify on the issue. The defence to that end can only have been an afterthought.

41. The appellant argued that the sex intercourse with the victims was consensual. It was proved that the victims were under the age of 18 years. The law considers persons under that age to be children who cannot consent to sex. The argument is a misdirection on the law. It is clear that the Appellant manipulated the victims so as to satisfy his sexual desires and used his authority as a pastor to exploit children sexually. He can only fit the description of a “pastor from hell”.

42. Upon a careful evaluation of the evidence, I find that the evidence adduced against the appellant was overwhelming and was convicted on solid evidence. Conviction on the 4 counts of defilement is thereby upheld.

43. The Appellant argued that this court has discretion in sentencing over offences created under section 8 of the *sexual Offences Act*. The Supreme Court in the case of Gichuki Mwangi v Republic deliver on 12th July 2025 held that courts have no discretion when sentencing under offences created by section 8 of the *Sexual Offences Act*. The argument of the Appellant is therefore dismissed.

44. However the trial court ordered that the sentences meted on the Appellant do run consecutively. This would mean that he will serve 50 years in prison I find that to be excessive punishment. I order that the sentences in the 4 counts to run concurrently. Safe for that the appeal is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 4TH DAY OF MARCH, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Ms Ochola for Respondent

Appellant – present virtually at Manyani Maximum Prison

Court Assistant - Rahma